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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. GEORGE RAY THOMAS, Defendant and Appellant.	B234814 (Los Angeles County Super. Ct. No. MA051307)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed as modified with directions.

Carla Castillo, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, parts I, the heading for part III, and the entirety of part III(G)(1) and part IV are certified for publication.

I. INTRODUCTION

A jury convicted defendant, George Ray Thomas, of possessing cocaine base for sale (Health & Saf. Code,[1] § 11351.5) and transporting a controlled substance (§ 11352, subd. (a)). Defendant admitted that special allegations were true concerning: two prior drug convictions (§ 11370.2, subd. (a)); two prior prison terms (Pen. Code, § 667.5, subd. (b)); and two prior serious or violent felony convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12). He was sentenced to 31 years to life in state prison.

In the published portion of this opinion, we address whether the two section 11370.2, subdivision (a) three-year prior drug conviction enhancements must be imposed on both counts. In addition, we address whether the trial court has discretion pursuant to Penal Code section 1385, subdivision (a) to strike either or both of the prior drug conviction enhancements. As defendant has received two indeterminate terms, the enhancements must be imposed on both counts subject to being stricken pursuant to Penal Code section 1385, subdivision (a). We affirm the judgment with modifications.

[The portion of the opinion that follows until the heading of part III is not published. Publication is to resume with the heading for part III.]

II. THE EVIDENCE

A. The Prosecution Case

Leon Moore was a narcotics detective with the Los Angeles County Sheriff's Department. On February 22, 2010, Detective Moore received information from a confidential informant concerning defendant. Detective Moore testified, "The individual

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[1] All further statutory references are to the Health and Safety Code except where otherwise noted.

told me that [defendant] would be driving in the Palmdale-Lancaster area and that [defendant] would have some rock cocaine on [his] . . . person." The informant described defendant's car and license plate number. At Detective Moore's request, Deputies Gregory Flores and Michael Prottung executed a traffic stop of defendant's vehicle. Defendant admitted he did not have a driver's license. He denied he had any weapons or drugs. Defendant consented to a search of his person. Deputies Prottung and Flores found a Saran-wrapped package about the size of a large egg between defendant's buttocks. The package contained 11.44 grams of cocaine base, a usable amount. Inside the package were smaller pieces of cocaine base. Defendant also had a cellular telephone and $63 in cash. Defendant did not appear to be under the influence of narcotics. There was nothing associated with the personal use of narcotics in defendant's car.

Defendant spoke to Deputy Flores. Defendant said he had received the narcotics as "a picture"—in other words, a sample. The sample was purportedly received from a friend. The friend was a drug dealer. Defendant was given the cocaine base while in the Michael Antonovich Courthouse. Defendant was in the courthouse on a traffic matter. Defendant said he was on his way to a park frequented by drug users.

About 30 minutes after he was stopped, defendant changed his explanation about the contraband. Defendant claimed to be holding the cocaine base for sheriff's narcotics Detective Daniel Welle. Defendant asked to speak with Detective Welle. Detectives Moore and Welle both arrived and separately spoke with defendant. Following the arrest in the present case, defendant began providing information to Detective Moore. Deputy Kenneth Price, a narcotics investigator, testified in response to a hypothetical question tracking the facts of this case that the cocaine based was possessed for sale.

The prosecution presented evidence that informants generally act under supervision. Deputy Price described the usual method: "[T]ypically . . . we would meet with . . . informant[s], and they would be searched prior to any type of operations; make sure they didn't have any narcotics on them or currency, and then we would provide them with an amount of currency. We would surveil them, either audibly with a wire or

visually, to a known location, and watch them constantly while they made a purchase, and then we would watch them all the way back to a designated area where we would meet. We would get the item that they purchased, the drugs, and then they would be searched again for any additional narcotics or currency." It was department policy to inform informants not to acquire narcotics on their own, without being followed by sheriff's detectives.

B. The Defense Case

Defendant testified as follows. He had incurred the following convictions: 1994, controlled substance possession for sale; 1994, two counts of assaultive conduct in the same case; 1998, controlled substance and marijuana possession for sale; and 2006, marijuana possession for sale. Starting in 1992, he had worked as an informant for several federal law enforcement agencies including the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, Firearms and Explosives. He understood the federal rules governing informants. Until recently, he had not worked for any local law enforcement entity.

In late December 2009 or early January 2010, defendant began providing information to Detective Welle. Defendant testified: "[Detective Welle] said he wanted everything from Palmdale, Lancaster, all the way to Santa Clarita. And he said he's gonna give me the phone number, but he said don't call him unless I got something for him or I got it right there or it's in my hand, in my possession."

On the day he was arrested, defendant had been in court on a traffic matter. While in the courthouse, he was contacted by a drug dealer. The dealer gave defendant a sample of cocaine base. Defendant put the drugs between his buttocks. He did so because he needed to behave like an active drug dealer. Defendant used a payphone to contact Detective Welle. Defendant used a payphone because he did not have cellular telephone reception inside the courthouse. In their conversation, defendant said he had

acquired cocaine base. Detective Welle directed defendant to meet in a park. Defendant left the courthouse and briefly stopped at home. Defendant was on his way to the park when he was stopped by the deputies. Defendant testified, "My intent was to turn [the drugs] over to Detective Welle."

C. Rebuttal

Detective Welle testified in rebuttal. He was a gang enforcement deputy; not a narcotics detective. He was not assigned to narcotics enforcement. Before using defendant as an informant, Detective Welle had spoken with a Bureau of Alcohol, Tobacco, Firearms and Explosives agent, Jason Hammond. Agent Hammond told Detective Welle defendant was a reliable confidential informant. Detective Welle instructed defendant to "window shop," not to gather any contraband. According to Detective Welle, only the narcotics bureau used informants to acquire controlled substances, and only under "extremely controlled" circumstances. Detective Welle described the controlled circumstances: "Narcotics detectives, when they meet up with their informant or their buyer, they meet up with them with a pair of investigators. They contact the buyer. They search him out to make sure that that buyer doesn't have any contraband, any money of their own, or any weapons on their person. [¶] They then actually drive them over - - because narcotics officers are what we call dirtied up or plainclothes. They've got beards, you know, they - - they don't look like cops. [¶] And then they go escort them to the location. The buyer goes and does the buy; sometimes with officers, sometimes without. But in each circumstance when they come out, they drive off, they'll go to a location, they stop, and they'll research the buyer or the informant, and they'll take everything off of his property and they'll go through it all and make sure, one, they've collected all the narcotics off of his person, and, two, any money that they've provided to him, that's left over, is also taken back." To the best of Detective Welle's knowledge, department policy prohibited a civilian acquiring narcotics

or weapons absent law enforcement supervision. Detective Welle testified: "To the best of my knowledge, [that is the policy], except for probably in the rarest of circumstances to where they've already got it and it's something that happens so spontaneously. But either way, there would still be a controlled response to that."

On cross-examination, Detective Welle admitted: "There might be an occasion where - - because of their nature as a . . . citizen on the street . . . where they come across something. In that situation, they would have to call us immediately, and we would come get whatever they had." Detective Welle had heard of that happening on one occasion; he had never personally known it to occur. Detective Welle admitted never specifically telling defendant not to take possession of contraband. On February 22, 2010, defendant telephoned Detective Welle *after*—but not *before*—the traffic stop. Defendant had not called earlier to say he was in possession of narcotics. Detective Welle never told defendant to meet at a park. Detective Welle spoke with Detective Moore. Defendant was not working on anything specific for Detective Welle on February 22, 2010. Detective Welle had not told defendant to take possession of narcotics on that date. Defendant's cellular telephone records did not reflect a call to Detective Welle on February 22, 2010 prior to the traffic stop, search and arrest.

[The heading for part III is to be published.]

III. DISCUSSION

[Parts III(A) through III(F) are deleted from publication.]

A. Continuance Motion

Defendant contends the trial court abused its discretion and denied him due process by failing to continue the trial. After the jury was empanelled and pre-instructed, on the first day of trial, defendant advised the court he was unable to proceed for mental health reasons. Defendant agreed that standby counsel, Michael Morse, should take over. Mr. Morse had been appointed standby counsel two days earlier. Mr. Morse requested a continuance: "The Court: . . . Mr. Morse, you're prepared to step in and move forward with the trial? [¶] Mr. Morse: I am. [¶] I would request a short continuance so I have some time to really prepare. I know the case has already gotten started and the People are ready to call their first witness, but I've only had . . . a 20-minute conversation with the defendant, and he has a lot of phone records and - - [¶] I have read the trial transcript for the first trial, but there may be one or two witnesses that he wants to bring in that I have to find out what their availability is. [¶] The Court: Well, it's - - and I think the defense investigator is the one. You may want to speak to Mr. Lewis at some point. [¶] But what I'm inclined to do is to deny the request to continue. We are here. We're ready. [¶] The People have all their witnesses ready to go; is that correct? [¶] [Deputy District Attorney Jason] Quirino: That's correct, Judge. [¶] The Court: And we are going to proceed, but, obviously, you'll have the lunchtime, *and if you need some additional time later on today* to consult further with [defendant] and see what kind of defense you may have, we can deal with that. Okay? [¶] Mr. Morse: Yes." (Italics added.)

We review the order denying Mr. Morse's trial continuance motion for an abuse of discretion. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 287; *People v. Haskett* (1982) 30 Cal.3d 841, 851-852.) Our Supreme Court has held: "Continuances in criminal cases may only be granted for good cause. ([Pen. Code,] § 1050, subd. (e).) While a trial court may not exercise its discretion over continuances so as to deprive the defendant or his attorneys of a reasonable opportunity to prepare (*People v. Sakarias* (2000) 22 Cal.4th 596, 646; *People v. Fudge* (1994) 7 Cal.4th 1075, 1107), the court's rulings in this case

had no such effect." (*People v. Snow* (2003) 30 Cal.4th 43, 70; see also *People v. Dorman* (1946) 28 Cal.2d 846, 851-852.) Our Supreme Court has also explained: "'"There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589; see also [*People v.*] *Jenkins* [(2000)] 22 Cal.4th [900,] 1039.)' (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118.)" (*People v. D'Arcy, supra,* 48 Cal.4th at pp. 287-288.)

The trial court did not abuse its discretion or deny defendant due process. The continuance request was made as the first witness to testify was about to take the stand. Four law enforcement officers testified for the prosecution on the first day of trial. Any delay at that point would have significantly disrupted the trial proceedings. Further, Mr. Morse stated he was prepared to move forward with the trial. He had read the transcript of the first trial. Mr. Morse acceded to the trial court's decision to proceed. The trial court could reasonably conclude the burden on the witnesses and jurors was great while the demonstrated need for an immediate continuance was minimal. Moreover, the trial court invited Mr. Morse to renew his continuance request later in the day. Mr. Morse did not do so. (Compare *People v. Maddox* (1967) 67 Cal.2d 647, 654.) Further, there is no showing defendant was prejudiced or deprived of a reasonable opportunity to prepare for trial. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1126 ["In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of a motion for a continuance does not require reversal of a conviction."]; accord, *People v. Riccardi* (2012) 54 Cal.4th 758, 810.) Defendant argues that a continuance would have allowed Mr. Morse to present a more successful defense. But there is no evidence in the record on direct appeal the denial of his continuance motion prevented Mr. Morse from providing a constitutionally proper defense.

B. Exclusion Of Evidence

Defendant asserts the trial court prejudicially erred and violated his constitutional right to present a defense when it excluded evidence he had "freelanced" as an informant for federal agencies. Defendant claims that as a federal informant, he took possession of narcotics while not under law enforcement surveillance. At his first trial, which ended in a mistrial, defendant testified he worked as an informant for the Federal Bureau of Investigation in the nineties. While working for the Federal Bureau of Investigation, defendant took possession of drugs without a specific buy being set up ahead of time. Defendant explained: "[T]hey gave me my own wire, audio, listening device - - [¶] . . . [¶] where if I'm . . . away from them and I'm not under their supervision, they give me a wire I wear. And if I'm around a possible suspect that we [are] investigating at the time, I turn - - I turn on the wire at my discretion, tape up to four hours, turn it off and then turn it in to the agent that's my handler at the time."

At the first trial, defendant further testified that when working with the Federal Bureau of Investigation, he would be free to take a sample of drugs from a drug dealer, even if he was not on a particular assignment at the time. Defendant said: "[Once I got the drugs I] would call my supervisor, handler, at the time, tell him a suspect we done had up under, I did a controlled buy from. He just approached me and told me he got a sample and to check it out, and if I want to get a bigger quantity, call him at a designated time or date, and he will have a . . . I mean, we do deals in large volumes, kilos of cocaine, heroin, crystal meth. I mean, we deal in volume. So for them to give me like a half ounce or an ounce of something would be equivalent to what I purchase from them, because when I go purchase it, everything goes through the Attorney General's office. They give me $20,000. They give me a brand new Cadillac Escalade truck or something,

tv's all in it [*sic*], cell phone, so I could project the image like I got that kind of money to do that kind of thing, and it's not no problem. I got the money in hand."

Defendant argues this evidence was relevant to his mistake of fact defense; he believed he was acting as a sheriff's department informant when he acquired the cocaine base. But defendant never specifically sought to so testify and never made an offer of proof to that effect. He never explained the relevance of evidence he had "freelanced" while acting as an informant for federal agencies. Mr. Morse did ask defendant, "Now, generally speaking, give us a summary of the kind of rules you had to follow [as an informant for federal agencies]." The trial court sustained a relevance objection to that question. No offer of proof was made, as a result, his claim is forfeited. (Evid. Code, § 354, subd. (a); *People v. Wallace* (2008) 44 Cal.4th 1032, 1059-1060; *People v. Morrison* (2004) 34 Cal.4th 698, 711.)

Even if not forfeited, there was no prejudice. (*People v. Wallace, supra*, 44 Cal.4th at p. 1060; *People v. Watson* (1956) 46 Cal.2d 818, 836.) There was evidence law enforcement agencies generally use informants to purchase contraband only under controlled circumstances. Those controlled circumstances include constant surveillance of the informant during the transaction. However, there was testimony that under rare circumstances, an uncontrolled buy might occur, followed by the informant's immediate contact with law enforcement handlers. Defendant testified he had worked since 1992 as an informant for several federal law enforcement agencies. He was familiar with the federal agency guidelines concerning informants. He had not worked with local agencies and assumed the sheriff's department's rules were consistent with the federal guidelines. Detective Welle told defendant, "[D]on't call . . . unless I got something for him or I got it right there or it's in my hand, in my possession." At trial, Detective Welle admitted: "I never specifically said, 'Don't do this.' I told him what I expected of him." The jury was instructed: "An act committed or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus a person is not guilty of a crime if [he] commits an act or omits to act under an actual belief in the

existence of certain facts and circumstances which, if true, would make the act or omission lawful."

Mr. Morse argued that defendant was trying to act as an informant and did not possess the intent to sell the cocaine base. Mr. Morse argued, "And if he reasonably believed -- not even reasonably believed. If he believed that what he was doing was working for Welle -- the right way or the wrong way, it doesn't matter because if he didn't have the intention to sell these drugs, that's all that matters -- and then you would need to find him not guilty . . . ." The jury rejected defendant's mistake of fact defense.

Evidence of defendant's guilt was overwhelming. Defendant was in possession of 11.44 grams of cocaine base hidden between his buttocks. Before he was searched, defendant denied he possessed anything illegal. After the cocaine was discovered, defendant told the deputies he was on his way to a park where drug users congregated. Defendant did not claim he was acting as a law enforcement informant before the drugs were found on his person. Detective Welle denied authorizing defendant to act unlawfully. Detective Welle specifically told defendant only to "window shop." Detective Welle denied defendant telephoned after obtaining the cocaine and prior to the February 22, 2010 arrest. Detective Welle further denied telling defendant to meet at a park. It is not reasonably probable the verdict would have been more favorable to defendant had he testified that he had "freelanced" for federal law enforcement agencies in the past. Further, because any error was harmless, defendant's ineffectiveness of counsel claim also fails. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126; *People v. Miranda* (1987) 44 Cal.3d 57, 84, disapproved on another point in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

C. Evidence Code Section 1101, subdivision (b): Prior Convictions Evidence

Defendant had sustained four prior narcotics possession for sale convictions. Defendant confusingly raises two arguments concerning that evidence. First, defendant

asserts it was error to admit the evidence, over defense objection, to prove intent to sell; the prior and current offenses were insufficiently similar. (Evid. Code, § 1101, subd. (b).) Defendant did not raise this argument in the trial court. He argued only that the prior convictions evidence was prejudicial. As a result the argument has been forfeited. (Evid. Code, § 353, subd. (a); *People v. Riccardi, supra,* 54 Cal.4th at p. 802; *People v. Redd* (2010) 48 Cal.4th 691, 730.)

Even if the assertion were properly before us, our review of the trial court's decision under Evidence Code sections 352 and 1101, subdivision (b), is for an abuse of discretion. (*People v. Davis* (2009) 46 Cal.4th 539, 602; *People v. Cole* (2004) 33 Cal.4th 1158, 1195.) A trial court abuses its discretion when its ruling falls outside the bounds of reason. (*People v. Thomas* (2011) 52 Cal.4th 336, 354-355; *People v. Carter* (2005) 36 Cal.4th 1114, 1149.) Defendant has not shown any abuse of discretion. Evidence of defendant's prior possession for sale convictions was admissible to support an inference he had an intent to sell in the present case. (*People v. Williams* (2009) 170 Cal.App.4th 587, 607; *People v. Ellers* (1980) 108 Cal.App.3d 943, 953; *People v. Foster* (1974) 36 Cal.App.3d 594, 597; *People v. Pijal* (1973) 33 Cal.App.3d 682, 691; *People v. Hill* (1971) 19 Cal.App.3d 306, 319-320.) Our Supreme Court has held, "To be admissible to show intent, . . . the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)" (*People v. Yeoman* (2003) 31 Cal.4th 93, 121-122; accord, *People v. Davis, supra,* 46 Cal.4th at p. 602; *People v. Ramirez* (2006) 39 Cal.4th 398, 463; *People v. Cole, supra,* 33 Cal.4th at p. 1194.) The least degree of similarity between the uncharged act and the charged offense is required in order to prove intent. (*People v. Thomas, supra,* 52 Cal.4th at p. 355; *People v. Carter, supra,* 36 Cal.4th at p. 1149; *People v. Ewoldt, supra,* 7 Cal.4th at

p. 402.) Here, the trial court had before it Penal Code section 969b prison records[2] as well as probation reports. The trial court did not explicitly rule on admissibility under Evidence Code section 1101. However, the trial court impliedly found the evidence was more probative than prejudicial. Defendant has not shown that ruling was outside the bounds of reason.

Second, defendant asserts the jury could not infer an intent to sell absent specific evidence of the events that led to the prior convictions. Defendant states: "[T]he [trial] court should have excluded evidence of his prior convictions because the prosecutor never bore his burden of proving the prior convictions were relevant to prove intent." (Italics omitted.) Defendant did not raise this argument in the trial court. As a result, he forfeited it. (*United States v. Olano* (1993) 507 U.S. 725, 731; *People v. Skiles* (2011) 51 Cal.4th 1178, 1189; see *People v. Tafoya* (2007) 42 Cal.4th 147, 166.) In any event, as discussed above, the trial court impliedly found the prosecution had in fact shown the evidence was relevant and probative. Defendant has not established any abuse of discretion in this regard. There is no authority that supports defendant's claim the prosecution had an affirmative duty to present evidence of the circumstances surrounding the prior convictions—even absent any objection.

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2 Penal Code section 969b states: "For the purpose of establishing prima facie evidence of the fact that a person being tried for a crime or public offense under the laws of this State has been convicted of an act punishable by imprisonment in a state prison, county jail or city jail of this State, and has served a term therefor in any penal institution, or has been convicted of an act in any other state, which would be punishable as a crime in this State, and has served a term therefor in any state penitentiary, reformatory, county jail or city jail, or has been convicted of an act declared to be a crime by any act or law of the United States, and has served a term therefor in any penal institution, the records or copies of records of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence."

Defendant asserts in part, "The error was prejudicial since the jury only could use the prior convictions to find [defendant] guilty based on propensity." We disagree. The trial court instructed the jury on the limited use of prior crimes evidence.[3] We presume the jury followed that instruction. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 73; *People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

D. Burden Of Proof Instruction: Mistake Of Fact Defense

Defendant argues the trial court prejudicially erred when it failed to instruct the jury on the burden of proof applicable to his mistake of fact defense. First, the trial court had no sua sponte duty to instruct the jury regarding defendant's defense negating the prosecution's proof of intent. As our Supreme Court has explained: "'In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case.' (*People v. Martinez* (2010) 47 Cal.4th 911, 953.) That duty extends to '"instructions on the defendant's theory of the case, including instructions 'as to defenses "'that the defendant is relying on . . . , or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'"'" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824.) But '"when a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, a defendant is not presenting a special defense invoking *sua sponte*

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[3] The trial court instructed the jury: "Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial, the prior narcotic related conviction. [¶] Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show: [¶] The existence of the intent which is a necessary element of the crime changed. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose."

instructional duties. While a court may well have a duty to give a 'pinpoint' instruction relating such evidence to the elements of the offense and to the jury's duty to acquit if the evidence produces a reasonable doubt, such 'pinpoint' instructions are not required to be given *sua sponte* and must be given only upon request.'" (*People v. Saille* (1991) 54 Cal.3d 1103, 1117.)" (*People v. Anderson* (2011) 51 Cal.4th 989, 996-997; accord, *People v. Jennings* (2010) 50 Cal.4th 616, 674-675.)

Possession of cocaine base for sale is a specific intent crime. (*People v. Montero* (2007) 155 Cal.App.4th 1170, 1175; *People v. Peck* (1996) 52 Cal.App.4th 351, 357; *In re Christopher B.* (1990) 219 Cal.App.3d 455, 465-467.) For criminal liability to attach, the prosecution was required to prove defendant had criminal intent, viz. the specific intent to sell cocaine base. (Pen. Code, § 20; *In re Jennings* (2004) 34 Cal.4th 254, 267; *People v. Montero, supra,* 155 Cal.App.4th at p. 1175; *People v. Peck, supra,* 52 Cal.App.4th at p. 357; *In re Christopher B., supra,* 219 Cal.App.3d at p. 466.) Mistake of fact is a defense that disproves criminal intent. (Pen. Code, § 26; *In re Jennings, supra,* 34 Cal.4th at pp. 276-277; *People v. Meneses* (2008) 165 Cal.App.4th 1648, 1661.) Here, defendant presented evidence he believed he was acting as an informant to negate criminal intent. The trial court had no sua sponte duty to instruct under these circumstances. (*People v. Anderson, supra,* 51 Cal.4th at pp. 996-997; *People v. Saille, supra,* 54 Cal.3d at p. 1117.)

Second, the jury *was* instructed that if it had a reasonable doubt whether defendant intended to sell the cocaine base, it must acquit him of that charge. The jury was instructed the prosecution bore the burden of proving defendant's guilt beyond a reasonable doubt: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." The jury was further instructed that one element the prosecution was required to prove beyond a reasonable doubt was defendant's intent to sell the cocaine base: "In order to prove [illegal

possession for sale of a controlled substance], each of the following elements must be proved: [¶] . . . [¶] 5. That person possessed the controlled substance with the specific intent to sell the same." And the jury was instructed that a mistake of fact negates criminal intent: "An act committed . . . by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus a person is not guilty of a crime if he commits an act . . . under an actual belief in the existence of certain facts and circumstances which, if true, would make the act or omission lawful." Hence, the jury was instructed it should acquit defendant if it had a reasonable doubt whether he had the requisite criminal intent because of a mistake of fact.

Third, even if the trial court should have given a reasonable doubt instruction in relation to defendant's mistake of fact defense, any error was harmless. (*People v. Earp* (1999) 20 Cal.4th 826, 887; *People v. Marschalk* (1962) 206 Cal.App.2d 346, 350; see *People v. Randle* (2005) 35 Cal.4th 987, 1003, overruled on a different point in *People v. Sarunchun* (2009) 45 Cal.4th 1172, 1201 [imperfect defense of others]; *People v. Blakeley* (2000) 23 Cal.4th 82, 93 [unreasonable self-defense].) As discussed above, the jury was instructed that mistake of fact was a defense. The jury was further instructed the prosecution bore the burden of proving, beyond a reasonable doubt, that defendant possessed the cocaine base with the intent to sell it. Defendant presented evidence he possessed the cocaine base in his capacity as an informant and he did not intend to sell it. Rather, defendant allegedly intended to turn the contraband over to Detective Welle. This evidence was proffered in an attempt to raise a doubt as to the intent element of the charged crime. As instructed, the jury necessarily understood that it could not convict defendant if it reasonably doubted whether he intended to sell the cocaine base. Further, Mr. Morse argued the defense theory— that defendant had no intent to sell the cocaine base. It is not reasonably probable further instruction would have resulted in a verdict more favorable to defendant.

E. Ineffective Assistance of Counsel

1. Overview

Our Supreme Court has held: "[T]o establish ineffective assistance of counsel, a defendant must demonstrate his attorney's performance fell below an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Strickland* [*v. Washington* (1984)] 466 U.S. [668,] 688, 694.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Ibid.*)" (*People v. Dickey* (2005) 35 Cal.4th 884, 913; accord, *People v. Gray* (2005) 37 Cal.4th 168, 206-207.) There is a rebuttable presumption, which it is defendant's burden to overcome, that counsel's performance fell within the wide range of reasonable professional assistance and the challenged actions were a matter of sound trial strategy. (*Strickland v. Washington, supra,* 466 U.S. at pp. 689–690; *People v. Prieto* (2003) 30 Cal.4th 226, 261-262; *People v. Lewis* (1990) 50 Cal.3d 262, 288.) Our Supreme Court has further held, "If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient." (*People v. Kipp* (1998) 18 Cal.4th 349, 366, accord, *People v. King* (2010) 183 Cal.App.4th 1281, 1311.)

2. Pinpoint Instruction

Defendant argues Mr. Morse was ineffective for failing to request an instruction to the following effect, "If you find that the defendant believed that he was working in an undercover capacity for the Los Angeles County Sheriff's Department, he did not have the specific intent or mental state required for possession for sale of cocaine base."

(Italics omitted.) To begin with, the trial court had no duty to give such an argumentative and incomplete instruction. (*People v. Homick* (2012) 55 Cal.4th 816, 890; *People v. Mincey* (1992) 2 Cal.4th 408, 437.) The mere fact that defendant believed he was acting as an undercover informant did not, under all circumstances, mean he must be acquitted. Defendant could believe he was an undercover informant and still possess narcotics for purposes of sale. Defendant has failed to demonstrate there is a reasonable probability the trial court would have given such an incomplete and argumentative instruction.

Even if Mr. Morse should have requested the cited instruction, there was no prejudice. Defendant has not established, as a demonstrable reality, that there is a reasonable probability of a different result. (*Strickland v. Washington, supra,* 466 U.S. at p. 697; *People v. Lawley* (2002) 27 Cal.4th 102, 136.) The jury was correctly instructed on mistake of fact. Further, Mr. Morse with clarity connected the facts of this case to the mistake of fact defense in his closing argument. There is no doubt the jury understood the nature of defendant's defense. (*People v. Smithey* (1999) 20 Cal.4th 936, 985-987; *People v. Webster* (1991) 54 Cal.3d 411, 444; *People v. Adcox* (1988) 47 Cal.3d 207, 246; see *People v. Lucero* (2000) 23 Cal.4th 692, 730 [counsel could not be faulted for failing to request duplicative instruction]; *People v. Mace* (2011) 198 Cal.App.4th 875, 889 [no ineffective assistance where "the instructions given correctly stated the law"].) The jury, not surprisingly, disbelieved defendant's unpersuasive claim he was driving through the Antelope Valley with cocaine base in his underwear because he thought he was an informant.

3. Prosecutorial Vindictiveness

Defendant argues the prosecution violated his due process rights by recharging a prior conviction allegation after striking it in the first trial. Defendant describes the prosecutor's actions as giving rise to a presumption of vindictiveness. Defendant asserts

that, alternatively, Mr. Morse was ineffective for failing to move to strike the prior conviction allegations.

Even if a presumption of prosecutorial vindictiveness arose (see *Blackledge v. Perry* (1974) 417 U.S. 21, 27-28; *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 369-371; *People v. Puentes* (2010) 190 Cal.App.4th 1480, 1486), defendant failed to preserve the issue. Our Supreme Court has held the prosecution bears the burden of rebutting a presumption of prosecutorial vindictiveness: "[T]o rebut [a presumption of prosecutorial vindictiveness] the prosecution must demonstrate that (1) the increase in charge was justified by some objective change in circumstances or in the state of the evidence which legitimately influenced the charging process and (2) that the new information could not reasonably have been discovered at the time the prosecution exercised its discretion to bring the original charge." (*In re Bower* (1985) 38 Cal.3d 865, 879; see also *Twiggs v. Superior Court, supra,* 34 Cal.3d at p. 374.) Because defendant did not raise this argument in the trial court, the prosecution had no opportunity to make the required showing. It follows that defendant forfeited his prosecutorial vindictiveness claim. (*People v. Edwards* (1991) 54 Cal.3d 787, 827; see *People v. Lucas* (1995) 12 Cal.4th 415, 476-477.)

Turning to his ineffectiveness of counsel claim, defendant has not established, as a demonstrable reality, that there is a reasonable probability of a different result. (*Strickland v. Washington, supra,* 466 U.S. at p. 697; *People v. Lawley, supra,* 27 Cal.4th at p. 136.) Even if Mr. Morse had raised the prosecutorial vindictiveness claim, on the record before us, we cannot say the prosecution would have been unable to overcome the presumption. Based on the present record, it is not reasonably probable the prosecution would have failed to sustain its burden. Further, facts may have arisen subsequent to the prosecution's motion to strike in the first trial that influenced the charging process the second time around. (See *In re Bower, supra,* 38 Cal.3d at pp. 873, 878-880; *Twiggs v. Superior Court, supra,* 34 Cal.3d at p. 374.) Defendant's claim is more appropriately

raised in a habeas corpus proceeding. (*People v. Johnson* (2009) 47 Cal.4th 668, 684-685; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

4. Failure To Challenge The Search Of Defendant's Buttocks

Defendant was originally represented by Robin Yanes. The present case resulted from a refiling of case No. MA048536. In case No. MA048536, a Penal Code section 1538.5 suppression of evidence motion was denied. After the case was refiled and prior to proceeding in pro se, defendant was still represented by Mr. Yanes. After the case was refiled, another Penal Code section 1538.5 suppression of evidence motion was filed by Mr. Yanes. On March 25, 2011, the motion to suppress filed by Mr. Yanes was denied. Thereafter, defendant proceeded in pro se until Mr. Morse took over after the retrial commenced.

Defendant argues that Mr. Yanes was ineffective because two issues were not litigated in the Penal Code section 1538.5 motion to suppress filed after the case was refiled. To begin with, defendant reasons the search of his buttocks exceeded the scope of his consent. Further, defendant argues that a body cavity search on a public street was unreasonable. Defendant argues theses two issues should have been litigated by Mr. Yanes.

Defendant has failed to sustain his burden of demonstrating deficient representation by Mr. Yanes. We do not know what evidence or argument might have developed as to litigating the additional issues. Defendant's ineffective assistance of counsel claim should be litigated, if at all, in a habeas corpus proceeding. (*People v. Mendoza Tello, supra,* 15 Cal.4th at pp. 266-267; *People v. Hinds* (2003) 108 Cal.App.4th 897, 900-902; see *People v. Johnson*, *supra*, 47 Cal.4th at pp. 684-685.)

F. Cumulative Error

Defendant claims the cumulative impact of prejudice from erroneous evidentiary rulings and an omitted jury instruction together with Mr. Morse's purported ineffectiveness rendered the trial unfair. Any error was harmless. And any cumulative error was also harmless. (*People v. Cornwell* (2005) 37 Cal.4th 50, 98, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

[Part III(G)(1) is published.]

G. Sentencing

1. Section 11370.2, subdivision (a)

Defendant received two indeterminate sentences. As to count 1, defendant received a sentence of 31 years to life. For his count 1 conviction, he received a sentence of 25 years to life because of his prior violent or serious convictions. And he received six additional years as to count 1 for the two section 11370.2, subdivision (a) three-year prior drug conviction enhancements. As to count 2, defendant received a concurrent 25-year-to-life sentence. However, the trial court never imposed the two section 11370.2, subdivision (a) three-year prior drug conviction enhancements on count 2. In the unpublished portion of this opinion, we have directed the trial court stay one of the two counts pursuant to Penal Code section 654, subdivision (a).

There is no issue as to whether defendant can receive indeterminate sentences. Defendant was previously convicted of deadly weapon assault and attempted murder. (Pen. Code, §§ 187, 245, subd. (a)(2), 664.) Hence, he was subject to indeterminate terms on both counts 1 and 2 as the law was in effect on the date of sentencing, July 25,

2011. (Pen. Code, §§ 667, subd. (e)(2)(A) (Stats. 1994, ch. 12, § 1, p. 74), 1170.12, subd. (c)(2)(A), as added by Prop. 184, as adopted by voters, Gen. Elec. (Nov. 8, 1994).) After defendant was sentenced, Penal Code sections 667, subdivision (e) and 1170.12, subdivision (c) were amended when the voters adopted Proposition 36 in the November 6, 2012 General Election. None of the November 6, 2012 amendments work to defendant's benefit. Defendant remains subject to indeterminate sentences. This is because one of defendant's prior serious and violent felony convictions was for attempted murder. The ameliorative provisions of Proposition 36 for recidivists are unavailable when the accused has been previously convicted of an attempted homicide as occurred here. (Pen. Code, §§ 667, subd. (e)(2)(C)(iv)(IV); 1170.12, subd. (c)(2)(C)(iv)(IV)[4] as adopted by voters, Gen. Elec. (Nov. 6, 2012).)

Section 11370.2, subdivision (a) states in part, "Any person convicted of a violation of . . . Section . . . 11351.5, or 11352 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of . . . Section . . . 11351.5, 11352 whether or not the prior conviction resulted in a term of imprisonment." Here, defendant was convicted of violating sections 11351.5 (count 1) and 11352, subdivision (a) (count 2), both of which bring him within the scope of section 11370.2. subdivision (a). Moreover, he had sustained two prior drug convictions for violating section 11351, in case Nos. TA027867 and A644778. The trial court imposed the section 11370.2, subdivision (a) prior drug conviction enhancements on count 1, but

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[4] Penal Code sections 667, subdivision (e)(2)(C)(iv)(IV) and 1170.12, subdivision (c)(2)(C)(iv)(IV) state in part: "If a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a serious or violent felony as defined in subdivision (d), the defendant shall be sentenced pursuant to paragraph (1) of subdivision (e) unless the prosecution pleads and proves any of the following: [¶] (iv) The defendant suffered a prior serious and/or violent felony conviction, as defined in subdivision (d) of this section, for any of the following felonies: [¶] (IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive."

not on count 2. Generally, the failure to impose a mandatory enhancement or strike it, if it is legally permissible to do so, is a jurisdictional error which may be corrected on appeal. (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6 [failure to impose Pen. Code, § 667, subd. (a) five-year prior conviction enhancement]; *In re Renfrow* (2008) 164 Cal.App.4th 1251, 1254 [failure to impose or strike a Pen. Code, § 667.5, subd. (b) prior prison term enhancement].)

Because defendant was sentenced to indeterminate terms, the prior conviction enhancements may be imposed on both counts. (*People v. Williams* (2004) 34 Cal.4th 397, 400 [Pen. Code, § 667, subd. (a) five-year enhancement for a prior serious felony conviction]; *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1559 [Pen. Code, § 667.5, subd. (b) prior prison term enhancements].) If this were a case where both counts were determinate terms, then only one set of section 11370.2, subdivision (a) prior conviction enhancements could be imposed. (*People v. Williams*, *supra*, 34 Cal.4th at p. 402; *People v. Tassell* (1984) 36 Cal.3d 77, 89-92, overruled on a different point in *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 386-387, 401; *People v. Misa* (2006) 140 Cal.App.4th 837, 846-847.) But because both counts resulted in indeterminate terms, both 25-year-to-life sentences may be enhanced pursuant to Section 11370.2, subdivision (a). Upon remittitur issuance, the trial court must impose both three-year section 11370.2, subdivision (a) enhancements on count 2, subject to the discussion in the following paragraph.

However, the trial court retains the authority to strike either or both of the three-year section 11370.2, subdivision (a) enhancements on count 2. No statute prevents a trial court from exercising discretion pursuant to Penal Code section 1385, subdivision (a). The dismissal power under Penal Code section 1385, subdivision (a) applies unless there is '"clear legislative direction"' that trial courts may not dismiss an enhancement. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 518; see *People v. Campos* (2011) 196 Cal.App.4th 438, 451.) Penal Code section 1385, subdivision (a) applies unless there is "clear language" evincing a legislative intention to deny a trial court the

authority to dismiss a particular enhancement. (*People v. Fritz* (1985) 40 Cal.3d 227, 230; see *People v. Campos*, *supra*, 196 Cal.App.4th at p. 451.) No such clear legislative direction appears anywhere in connection with section 11370.2, subdivision (a). Thus, the trial court retains discretion to strike or dismiss either or both of the section 11370.2, subdivision (a) three-year prior drug conviction enhancements on count 2. Once the remittitur issues, the trial court may, if it chooses, exercise its discretion and strike or dismiss either or both of the count 2 prior drug conviction enhancements. Any dismissal order striking or dismissing either or both of the enhancements must fully comply with the requirement that the reasons be set forth in the clerk's minutes. (Pen. Code, § 1385, subd. (a); *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 531.)

[The remainder of part III(G) is deleted from publication.]

2. Penal Code section 654, subdivision (a)

The Attorney General concedes that defendant could not be punished for both possessing and transporting the cocaine base. (Pen. Code, § 654, subd. (a); *People v. Watterson* (1991) 234 Cal.App.3d 942, 947, fn. 14; *People v. Thomas* (1991) 231 Cal.App.3d 299, 306-307; *People v. Johnson* (1970) 5 Cal.App.3d 844, 847, disapproved on another point in *People v. Rubacalba* (1993) 6 Cal.4th 62, 66.) Upon remittitur issuance, the trial court must stay the sentence on one of the two counts.

3. Penal Code section 667.5, subdivision (b)

The trial court imposed and *stayed* two Penal Code section 667.5, subdivision (b) prior separate prison term enhancements on count 1. However, the trial court was

required to either impose or *strike* the prior separate prison term enhancements. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Garcia, supra,* 167 Cal.App.4th at pp. 1559-1562; *People v. Bradley* (1998) 64 Cal.App.4th 386, 390-392.) Moreover, the trial court was required to either impose or strike the prior separate prison term enhancements *as to each count*. (*People v. Garcia, supra,* 167 Cal.App.4th at pp. 1559-1562; see *People v. Williams, supra,* 34 Cal.4th at pp. 401-405; *People v. Misa, supra,* 140 Cal.App.4th at pp. 844-847 [§ 667, subd. (a)(1)].) Upon remittitur issuance, the trial court must exercise its section 1385, subdivision (a) discretion and either impose or strike the Penal Code section 667.5, subdivision (b) enhancements as to each count. (*People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1041; *People v. Bradley, supra,* 64 Cal.App.4th at pp. 390, 400, fn. 5.) If the trial court elects to strike any Penal Code section 667.5, subdivision (b) enhancement, it must state its reasons for doing so in "an order entered upon" the minutes. (Pen. Code, § 1385, sub. (a); *People v. Superior Court (Romero), supra,* 13 Cal.4th at p. 531; *People v. Orin* (1975) 13 Cal.3d 937, 944; *People v. Garcia, supra,* 167 Cal.App.4th at p. 1559.)

4. Criminal Laboratory Analysis Fee

The trial court failed to impose any criminal laboratory analysis fee under section 11372.5, subdivision (a). Defendant was convicted of violating section 11351.5 (count 1) and 11352, subdivision (a) (count 2). He was subject to a $50 criminal laboratory analysis fee for each separate offense. (§ 11372.5, subd. (a).) Additionally, each $50 criminal laboratory analysis fee was subject to the following penalties and a surcharge: $50 state penalty (Pen. Code, § 1464, subd. (a)(1); a $35 county penalty (Gov. Code, § 76000, subd. (a)(1)); a $10 state surcharge (Pen. Code, § 1465.7, subd. (a)); a $15 state court construction penalty (Gov. Code, § 70372, subd (a)(1)); a $5 deoxyribonucleic acid penalty (Gov. Code, § 76104.6, subd. (a)(1)); a $5 state-only deoxyribonucleic acid penalty (Gov. Code, § 76104.7, subd (a)); and a $10 emergency medical services penalty

(Gov. Code, § 76000.5, subd. (a)(1)). There is no requirement that defendant be found able to pay the criminal laboratory analysis fee before it may be imposed. (§ 11372.5, subd. (a); *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1519; *People v. Staley* (1992) 10 Cal.App.4th 782, 784-785.) The judgment must be modified to impose the $50 criminal laboratory analysis fee *plus* the penalties and the surcharge totaling $130 as to each count. The abstract of judgment must be amended so reflect. (See *People v. Meloney* (2003) 30 Cal.4th 1145, 1155-1156.)

5. Court Operations Assessment

Defendant was subject to a $40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)) as to each count. (*People v. Sencion* (2012) 211 Cal.App.4th 480, 484-485; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866; see *People v. Alford* (2007) 42 Cal.4th 749, 758, fn. 6.) The oral pronouncement of judgment must be modified to so provide. The abstract of judgment is correct in this regard and need not be amended.

6. Court Facilities Assessment

Defendant was subject to a $30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)) as to each count. (*People v. Sencion, supra*, 211 Cal.App.3d at pp. 484-485; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3.) The oral pronouncement of judgment must be amended to so reflect. The abstract of judgment is correct in this regard and need not be amended.

7. Presentence Custody Credit

Defendant received credit for 517 days in presentence custody and 258 days of conduct credit. However, defendant was in presentence custody for 497 days. Defendant was arrested on February 22, 2010. He was released on $30,000 bail on February 23, 2010. Following his arraignment on March 18, 2010, the bail amount was increased to $1,000,000. The existing bail bond was exonerated and defendant was remanded to custody. He remained in custody until he was sentenced, on July 25, 2011. Further, because he had prior serious or violent felony convictions, he was entitled to only two days of conduct credit for every four days in actual presentence custody. (Former Pen. Code, § 4019 as amended by Stats. 2009 (3rd Ex. Sess. 2009-2010, ch. 28, § 50.) Therefore, the judgment must be modified to award defendant credit for 497 days in presentence custody plus 248 days of conduct credit for a total of 745 days.

[The balance of the opinion is to be published.]

IV. DISPOSITION

The judgment is modified to impose: Health and Safety Code section 11370.2, subdivision (a) enhancements on count 2 (subject to the trial court striking them); a $50 criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)) plus penalties and the surcharge totaling $130 as to each count; a $40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)) as to each count; and a $30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)) as to each count. The judgment is further modified to award defendant credit for 497 days in presentence custody plus 248 days of conduct credit for a total of 745 days. In all other respects, the judgment is affirmed. Upon remittitur issuance, the trial court shall stay the sentence on one of the two counts pursuant to Penal Code section 654, subdivision (a). In addition, the trial court is to either impose or strike

the prior separate prison term enhancements (Pen. Code, §§ 667.5, subd. (b), 1385, subd. (a)) as to each count.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.